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No.

IN THE

Supreme Court of the United States

FRANK LAGRUA and KENNETH ASHLEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a criminal prosecution for, *inter alia*, aiding and abetting the commission of substantive crimes, in violation of 18 U.S.C. § 2, does a jury instruction which omits any definition of "aiding and abetting" constitute plain error, and violate the guarantees under the Fifth Amendment to due process and under the Sixth Amendment to a jury trial?

PARTIES TO THE PROCEEDING

Petitioners Kenneth Ashley and Frank LaGrua, and Respondent United States of America ("United States"), the parties named in the caption, were the only parties before the Court of Appeals for the Second Circuit.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit was not reported. Its decision was rendered in the form of a Summary Order dated June 11, 1999, and is reproduced at 1a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit ("Court of Appeals") was entered on June 11, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2, cl. 3 of the Constitution provides: "The trial of all crimes, except in cases of impeachment, shall be by jury. . . ."

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury . . ."

Federal Rule of Criminal Procedure 52(b) provides that "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF THE CASE

A. Introduction

The central question presented by this Petition is whether a trial court's jury instruction, which omits a definition of an element of the charged offense — here, a definition of the terms "aiding and abetting" — constitutes plain error, and "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736 (1993). In this case, centering upon allegations of wire fraud, and subsequent perjury as part of a coverup, eight counts of the indictment charged Petitioners with violating various criminal statutes on a theory, *inter alia*, of aiding and abetting. It was thus essential for the Court to instruct the jury on the elements of aiding and abetting. Yet the trial court did not do so, reading the statute but otherwise never defining the terms contained in 18 U.S.C. § 2. The trial court thus did not instruct the jury that it was required to find that the defendant through his own conduct "associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." Sand, *Federal Jury Instructions*, ¶ 11.01, p. 11-6 (Matthew Bender & Co.,

10/94). So too did the trial court omit the traditional balancing language which advises the jury that mere association between the principal and the defendant accused of aiding and abetting, or even presence coupled with knowledge, is insufficient to establish guilt. As shown below, the omissions were prejudicial to both Appellants.

B. Statement of Facts

From 1983 until late 1990, Liberty Mortgage Banking, Ltd. ("Liberty") was a mortgage banker licensed by the State of New York. Operating from its offices in Melville, New York, Liberty made and serviced residential mortgage loans, underwrote mortgage loans originated by other mortgage brokers, and sold mortgages on the secondary mortgage market. Petitioner Kenneth Ashley was the owner and President of Liberty, and Petitioner Frank LaGrua was a Vice-President, in charge of consumer mortgage sales.

In 1985, Liberty became an approved mortgage seller/ servicer of the Federal Home Loan Mortgage Corporation ("Freddie Mac"). Freddie Mac was a private corporation, originally created by Congress pursuant to the Federal Home Loan Mortgage Corporation Act of 1970. During the relevant time period, Freddie Mac purchased mortgage loans from approved sellers such as Liberty, in turn selling mortgage-backed securities to the public. At the time of the events described in the indictment, Liberty employed more than 80 people, with an annual payroll of approximately $3 million dollars. It had originated more than $1 billion in mortgages, of which more than $500 million had been sold to Freddie Mac.

On October 17, 1990, Freddie Mac notified Liberty that it was terminating Liberty's contract as a seller/servicer, and transferring the servicing of its mortgage portfolio — then consisting of nearly 2,500 mortgages amounting to upwards of $230 million dollars — to another mortgage servicer. Liberty thereupon commenced a civil action against Freddie Mac in the United States District Court for the Eastern District of New York, alleging wrongful termination, seeking damages and injunctive relief. *Liberty Mortgage Banking, Ltd., Kenneth Ashley, and Yoel Movtady v. Federal Home Loan Mortgage Corporation, d/b/a Freddie Mac*, 90 CV 406.

In November, 1994 the first of a series of indictments was returned against Petitioners. Several superseding indictments were filed, and extensive pretrial litigation ensued. (*See United States v. Ashley and LaGrua*, 905 F. Supp. 1146 (E.D.N.Y. 1995)).

The case finally proceeded to trial in the District Court in June, 1997, to resolve the fraud and related perjury charges. The fraud charges revolved around four Liberty loans which were originated during July and August, 1990, and which were later sold to Freddie Mac. The United States alleged that two individuals and two couples — relatives or neighbors of Petitioner LaGrua — applied for mortgage loans for the acquisition of four separate properties in which Petitioner Ashley held an undisclosed ownership interest. The government's proof at trial indicated that the loan applications were inaccurate in several respects, including inflated representations of income, false appraisals, incorrect valuations of comparable sales, and, in each, a false representation that the properties were owner-occupied and that the loans were refinancings of existing loans. Each defendant was alleged to have aided and abetted the respective borrowers' fraudulent loan applications.

The perjury allegations arose from testimony given by the borrowers at depositions given in 1991, in connection with the civil litigation. According to the government, each of the loan applicants committed perjury at his or her deposition in 1991 as part of an attempt to cover up his or her fraudulent loan application. Each defendant was alleged to have aided and abetted the respective borrowers' perjury.

Thus, both Mr. Ashley and Mr. LaGrua were charged in each substantive count with violating Title 18 United States Code, Section 2. And under the evidence outlined above, the principles of accessorial liability were of critical importance. With respect to Petitioner Ashley, for instance, who neither met the four borrowers nor spoke to them, his culpability for the substantive offenses of subornation of perjury could only be based upon 18 U.S.C. § 2. Similarly with respect to Appellant LaGrua, his culpability with respect to Liberty's sales of the loans to Freddie Mac could only be through 18 U.S.C. § 2.

During the court's charge conference on June 19, 1997 the topic of an instruction of aiding and abetting never arose. On June 24th, however, immediately before summations were to commence, the government stated that it was requesting a charge on aiding and abetting, without providing proposed text. The court stated that it would so instruct, asking the government to provide it with "the appropriate language." (*Id.*) The record does not indicate what, if anything, the government provided.

But an "instruction" was never in fact given. The court referred to aiding and abetting three times in its instructions; twice, it simply read the first portion of 18 U.S.C. § 2, and the third, it "supplemented" its earlier remarks by adding a

confusing additional instruction on "intent." At no time, however, did the court define any of the elements of 18 U.S.C. § 2.

The court's first remarks on the topic came after its completion of the instructions on the substantive wire fraud allegations. The court's instruction, in its entirety, was as follows:

> The defendants are charged with aiding and abetting one another and others in the commission of the substantive wire fraud offenses presently under discussion as set forth in Counts Two, Three, Four and Five of the indictment.
>
> The statute which defines aiding and abetting reads as follows: Title 18, United States Code, Section 2(a): "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Without any attempt to define those terms, the court immediately turned ("while this portion of the charge is still fresh in your mind," it said), to an extended reading of the Introduction to the substantive counts in the indictment. This rereading essentially was a reprise of the government allegations against the Appellants, and went on for some ten pages. And with that, the court stated, it had "concluded [its] instruction on Counts Two, Three, Four and Five, and so-called substantive wire fraud counts." (*Id.*)

The same error affected the instructions on the perjury counts. Following a lengthy reading from the indictment the

court charged the jury on the elements of subornation of perjury and then again indicated that "the defendants are charged with aiding and abetting one another and others" and again, simply read the first portion of 18 U.S.C. § 2 without explanation, description, or amplification.

Later, in the midst of the court's charge on conspiracy to commit wire fraud, the government asked the court to supplement its earlier aiding and abetting instruction with an instruction on intent. Government counsel stated,

> I think the jury should be told it is merely not enough to counsel. There has to be — it's kind of similar to the conspiracy charge. You just can't do something, you've got to do it with an intent.

The court then interrupted the instruction on conspiracy, reminded the jury of the court's earlier "instruction" on aiding and abetting, and stated that it would supplement that charge as follows:

> A person who aids, abets, counsels or commands or induces or procures the commission of such an offense must do so with the specific intention that the offense charged which you are considering be committed.
>
> In other words, this goes to the operation of the person's state of mind in essence. The idea of aiding and abetting is that if one person induces, causes, procures another to commit an offense against the United States, a person who basically acts through another is treated the same as if he or she committed the acts themselves.

> But the point is, there's more required concerning aiding and abetting. What more is required is when the person procures another to commit a crime against the United States, if that's what in fact occurred, that person, the person that prompted the action, must have a specific intention than [sic] the person is doing so, that the crime occur, that something charged in the accusatory instrument occurs.

For the reasons set forth below, the trial court's failure ever to define or explain the elements of aiding and abetting was plain error, which was not cured by its provision of the supplemental charge, which was itself incorrect. The error here pervaded the instructions on all of the substantive counts of the indictment, rendering the trial an unreliable vehicle for determining guilt or innocence, and thus fundamentally unfair within the meaning of established precedent.

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS IN CASES INVOLVING JURY INSTRUCTIONS WHICH OMIT AN ELEMENT OF THE OFFENSE.

One day before the United States Court of Appeals for the Second Circuit affirmed the convictions of Petitioners Kenneth Ashley and Frank LaGrua, this Court decided *Neder v. United States*, __ U.S. __, 67 U.S.L.W. 4404 (6/10/99). *Neder* involved a single-defendant tax fraud prosecution, in which the defendant was shown to have underreported income in excess of $5 million dollars to the Internal Revenue

Service. The trial court determined that the issue of "materiality" was not a question for the jury, and found that the evidence established that element. The court thus did not instruct the jury on the element of materiality.[1]

Before this Court, the issue was whether the failure to instruct the jury on a necessary element of the charged offense was an error so intrinsically harmful as to require automatic reversal, or whether it was an error which was subject to harmless-error review. This Court held that such constitutional violations may be found harmless in cases "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Id.* at 4408. This Court stated,

> Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error — for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding — it should not find the error harmless.

Id. at 4409. In *Neder*, this Court noted, the defendant had never contested the element of materiality, and the evidence supporting the element was "overwhelming." *Id.*

1. The ruling on the materiality issue was erroneous under this Court's later decision in *United States v. Gaudin*, 515 U.S. 506 (1995)

Accordingly, the trial court's error "did not contribute to the verdict obtained." *Id.* at 4408, quoting from *Chapman v. California*, 386 U.S. 18 (1967).

The Second Circuit did not apply this standard, and its affirmance of these convictions was erroneous.

A. The Jury Instruction Was Incorrect

Erroneous jury instructions directly infringe upon a jury's factfinding role and directly impact its deliberative process in ways which are not readily calculable. It is, therefore, critical to ensure that instructions be correct.

> If justice is to be done in accordance with the rule of law, it is of paramount importance that the court's instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime that must be proved by the government beyond a reasonable doubt, *see Holland v. United States*, 348 U.S. 121, 138, 75 S.Ct. 127, 99 L.Ed. 150 (1954)

United States v. Clark, 475 F.2d 240, 248 (2d Cir. 1973). *See also Sullivan v. Louisiana*, 508 U.S. 275 (1993) (citation omitted) ("The [sixth amendment right to a jury trial] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.' ").

The instruction here was erroneous for it consisted of nothing more than reading a portion of the text of 18 U.S.C. § 2, and thus was neither "clear, accurate, complete [nor]

comprehensible." *Clark*, *supra*, at 248. It fell far short of the standard formulation of the aiding and abetting charge, which is now more than 50 years old. It was endorsed by this Court in *Nye & Nissen v. United States*, 336 U.S. 613 (1949), when it approved Judge Learned Hand's instruction in *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1948) that, in order to convict a defendant of aiding and abetting another to commit an offense, the government must prove that the defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." Judge Sand, in *Federal Jury Instructions*, ¶11.01, p. 11-6 (Matthew Bender & Co., 10/94), notes that the *Nye & Nissen* standard focuses on the relationship between the defendant's *conduct* and the crime, and "has become commonplace." The court below omitted all reference to the defendants' conduct in connection with aiding and abetting. So too did he omit the traditional balancing language (suggested by *Sand*) which advises the jury that mere association between the principal and the defendant accused of aiding and abetting, or even presence coupled with knowledge, is insufficient to establish guilt.

The trial court's supplemental instruction did not correct the error. First, it did not "supplement" any prior definition of aiding and abetting, since none had been given in the first place. Second, the supplement was itself confusing and incorrect. For instance, the court said,

> But the point is, there's more required concerning aiding and abetting. What more is required is when the person procures another to commit a crime against the United States, if that's what in fact occurred, that person, the person that

> promotes the action, must have a specific intention than [sic] the person is doing so, that the crime occur, that something charged in the accusatory instruments occurs.

For a criminal conviction on a theory of aiding and abetting, it is insufficient for the government to prove merely that the defendant intended that "something" charged in the indictment occur — as this charge purports to authorize. The law requires that, with respect to the specific allegation the jury is considering, the evidence demonstrate that defendant "wilfully associate himself in some way with the criminal venture, that he wilfully participate in it as something that he wishes to bring about, that he wilfully seek by some action of his to make it succeed," to quote from the so-called "usual" instruction on aiding and abetting. The trial never said that, and its supplemental "instruction" — again, without any definition of the terms of the aiding and abetting statute, without announcing the requirement of personal participation by the defendant in the venture, and without the balancing language concerning "mere presence" was incorrect. The Second Circuit's affirmance, predicated upon its holding that "the court's instructions as a whole adequately conveyed the law of aiding and abetting" was thus insupportable.[2]

B. The Error Was Not Harmless

Neder involved the failure to instruct the jury on an element which went undisputed by the defendant throughout the trial. At no time did the defendant in that case claim that

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2. The Second Circuit also stated that it rejected the Petitioners' "additional contention that the trial court erred by failing to give the jury a . . . charge that evidence of mere presence is not sufficient. . . ." Petitioners never advanced such a claim.

the income underreported on the return was immaterial; instead, he argued that the $5 million dollars represented loan proceeds which were not taxable, and that he relied in good faith on the advice of his accountants and lawyers. 67 U.S.L.W. at 4408.

The trial of Petitioners was all about whether or not the defendants — *acting through others* — had committed the charged crimes. The record is replete with evidence that the crimes Appellants were charged with committing was based on the conduct of others. Mr. Ashley, for example, never met or spoke to any of the loan applicants, whose perjury he was charged with aiding and abetting. Mr. LaGrua ever interacted with Freddie Mac or even spoke to anyone at Liberty about Freddie Mac, yet he was convicted of aiding and abetting the scheme to defraud it.

The Second Circuit's own syntax betrays the necessity for the trial court to have provided a careful instruction on acting through others and the relationship between that conduct and criminal liability: "Ashley orchestrated both the fraud and subornation-of-perjury schemes, and LaGrua helped implement those schemes by enlisting persons to pose as home owners and later meeting with them to ensure their favorable perjured testimony." (6a).

This case is therefore not at all analogous to *Neder*, where the defendant did not contest the omitted element. Rather, this case involved defendants who both contested the omitted element, and raised evidence sufficient to support a finding that they were not aiders and abettors, thus precluding a finding of harmless error.

CONCLUSION

This case presents a question of unquestionable importance: whether a criminal defendant's conviction can be allowed to stand when the jury which deliberated his fate never received a definition of aiding and abetting, with which he was charged in each substantive count in the indictment. If the opinion below is allowed to stand, Petitioners will have been denied their right to a jury trial and to due process, and will forever suffer the consequences of convictions returned by a jury whose factfinding with respect to a contested element in each substantive count was compromised by the lack of judicial guidance.

Accordingly, Petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED JUNE 11, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

* * *

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the **11th** day of **JUNE** one thousand nine hundred and ninety-nine.

Present: HONORABLE AMALYA L. KEARSE,

HONORABLE ROGER J. MINER,

HONORABLE JOSEPH M. McLAUGHLIN,

Circuit Judges.

Nos. 98-1323(L), -1568

UNITED STATES OF AMERICA,

Appellee,

– v. –

FRANK LAGRUA, KENNETH ASHLEY,

Defendants-Appellants.

* * *

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

Defendants Frank LaGrua and Kenneth A. Ashley appeal from judgments entered the United States District Court for the Eastern District of New York following a jury trial before Denis R. Hurley, *Judge*, convicting them of wire fraud and subornation of perjury, in violation of 18 U.S.C. §§ 1343 and 1622, respectively, and of conspiracy to commit those offenses, in violation of 18 U.S.C. § 371; and convicting LaGrua of perjury, in violation of 18 U.S.C. § 1621. LaGrua and Ashley were sentenced principally to 24-month and 46-month terms of imprisonment, respectively, each to be followed by a three-year term of supervised release, and were ordered to pay restitution. On appeal, they complain of, *inter alia*, preindictment and pretrial delay, the trial court's instruction on aiding and abetting, the exclusion of certain deposition testimony, and the refusal to order a new trial on the basis of their posttrial discovery of allegedly perjurious trial testimony. Finding no basis for reversal, we affirm.

1. *Speedy Trial*

Defendants contend that their Sixth Amendment rights to a speedy trial were violated by delays in the filing of the indictment and in bringing the case to trial. We disagree. The speedy trial protections of the Sixth Amendment are activated only when a person is arrested, charged, or indicted. *See, e.g., United States v. Marion*, 404 U.S. 307, 320-21 (1971); *United States v. Lane*, 561 F.2d 1075, 1077 (2d Cir. 1977). Although the Due Process Clause provides some

limited protection against preindictment delay, *see, e.g.*, *United States v. Lovasco*, 431 U.S. 783, 789 (1977); *United States v. Scarpa*, 913 F.2d 993, 1014 (2d Cir. 1990), LaGrua and Ashley have not shown unjustifiable conduct by the government in connection with that delay and hence have not shown a violation of their rights to due process.

As to the contention that there was unconstitutional delay following the indictment, we similarly find no error. "Whether excessive delay violates the Speedy Trial Clause depends on a balancing of four factors: (1) the length and (2) reason for the delay, (3) whether the defendant timely asserted his rights, and (4) whether the defendant has been prejudiced by the delay." *United States v. Jones*, 91 F.3d 5, 7 (2d Cir. 1996); *see, e.g.*, *Doggett v. United States*, 505 U.S. 647, 651 (1992); *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *Rayborn v. Scully*, 858 F.2d 84, 89 (2d Cir. 1988), *cert. denied*, 488 U.S. 1032 (1989). Government delays in bringing the accused to trial may be justified by, *inter alia*, time spent obtaining the testimony of important witnesses, engaging in pretrial motion practice, and seeking guilty pleas from codefendants, especially in a complex case. *See, e.g.*, *Doggett v. United States*, 505 U.S. at 656; *United States v. Vassell*, 970 F.2d 1162, 1164-65 (2d Cir.), *cert. denied*, 506 U.S. 1009 (1992). A decision of the district court not to dismiss the indictment on speedy trial grounds, after consideration of the above factors, is reviewed for abuse of discretion. *See generally United States v. Jones*, 91 F.3d at 8.

In the present case, the district court found that this was a complex case and that the adjournments and continuances

that had been granted were necessary for the government to obtain superseding indictments, respond to defense motions, pursue motions of its own, and procure a guilty plea from a codefendant. LaGrua and Ashley consented to nearly all of those adjournments and continuances, and they raised their speedy trial contention only belatedly. The district court weighed all the pertinent factors and we see no abuse of discretion in its denial of defendants' motions to dismiss on speedy trial grounds.

2. *The Aiding-and-Abetting Instruction*

Defendants contend that, in its instructions to the jury, the district court failed to describe the elements of aiding and abetting. As defendants did not object to those instructions at trial, they are not entitled to reversal on this basis unless the charge constitutes plain error. *See, e.g., United States v. Olano*, 507 U.S. 725, 732-35 (1993); Fed. R. Crim. P. 30, 52(b); *United States v. Malpeso*, 115 F.3d 155, 165 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 2366 (1998). "Plain" error is error that "affect[s] substantial rights" and "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. at 732 (internal quotation marks omitted).

An aiding-and-abetting instruction must convey the principle that the government has the burden of proving that "the underlying crime was committed by someone other than the defendant and that the defendant himself either acted or failed to act with the specific intent of advancing the commission of the underlying crime." *United States v. Pipola*, 83 F.3d 556, 562 (2d Cir.), *cert. denied*, 519 U.S.

869 (1996); *see also United States v. Masotto*, 73 F.3d 1233, 1240-41 (2d Cir.) (charge is sufficient where jury required to find the defendant had more then mere knowledge of criminality), *cert. denied*, 519 U.S. 810 (1996). In the present case, the district court read to the jury the text of 18 U.S.C. § 2(a), *i.e.*, that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal"; and it instructed that in order to convict either defendant on an aiding-and-abetting theory the jury must find that that defendant induced, caused, or procured another to commit a crime against the United States, and that he did so with the specific intent that the law be violated. We conclude that the court's instructions as a whole adequately conveyed the law of aiding and abetting.

Defendants' additional contention that the trial court erred by failing to give the jury a so-called *Garguilo* charge that evidence of mere presence is not sufficient to establish aiding and abetting, *see United States v. Garguilo*, 310 F.2d 249, 253-55 (2d Cir. 1962), is likewise meritless. While we have on occasion concluded that the omission of such an instruction was reversible error in a close case, *see, e.g., id.*; *United States v. Terrell*, 474 F.2d 872, 876 (2d Cir. 1973), we have declined to reverse where the evidence clearly showed that the defendant was more than a mere bystander, *see, e.g., United States v. Erb*, 543 F.2d 438, 447 (2d Cir.), *cert. denied*, 429 U.S. 981 (1976), particularly where no such instruction was requested, *see United States v. Terrell*, 474 F.2d at 876 & n.2.

In the present case, defendants did not request a *Garguilo* charge, and the case was not close. There was ample evidence

that neither Ashley nor Lagrua was a mere bystander, as Ashley orchestrated both the fraud and the subornation-of-perjury schemes, and LaGrua helped implement those schemes by enlisting persons to pose as home owners and later meeting with them to ensure their favorable perjured testimony. Thus, even if further elaboration on aiding and abetting were warranted, we could not find that its absence seriously affected defendants' substantial rights, given the overwhelming evidence that each defendant took steps specifically designed to further the success of the fraudulent scheme. In sum, we see no error in the aiding-and-abetting instructions, plain or otherwise.

3. *The Strickland Deposition*

Defendants contend that the district court erred in not permitting them to introduce at trial the deposition testimony of the deceased Robert W. Strickland under the "residual" hearsay exception provided by Fed. R. Evid. 804(b)(5) (now consolidated with former Rule 803(24) and transferred to Fed. R. Evid. 807, with "[n]o change in meaning," Fed. R. Evid. 804 Advisory Committee Note (1997)) for hearsay statements that have circumstantial guarantees of trustworthiness but are not covered by any other exception. As a procedural prerequisite, the Rule provides that "a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it . . . ." Fed. R. Evid. 807. The district court ruled the Strickland deposition testimony inadmissible

because defendants had not given the government pretrial notice of their intent to offer that testimony at trial. We see no error in that ruling.

Although defendants contend that a letter they sent to the government prior to trial could have been construed as the requisite notice, neither the subject matter nor the contents of that letter carried such an implication. The letter concerned only defendants' contention that they were being denied a speedy trial. In it, defendants argued that the infringement of that right could not be cured by the introduction at trial of the Strickland deposition. Further, the letter suggested that if the government attempted to offer that deposition in evidence, defendants might object. The district court correctly ruled that that letter did not give the government the requisite notice that defendants intended to offer the Strickland deposition in evidence at trial.

In seeking to offer the Strickland deposition at trial, defendants, relying on *United States v. Medico*, 557 F.2d 309 (2d Cir.), *cert. denied*, 434 U.S. 986 (1977), suggested that the court could excuse their noncompliance with the pretrial notice requirement and compensate for the lack of notice simply by giving the government an adjournment, and they pursue that argument on appeal. We disagree. Although a brief footnote in *Medico* indicated, without analysis, that that was a permissible course of action under Rule 804(b)(5), *see* 557 F.2d at 316 n.7, this Court later analyzed the identical notice provision of Rule 803(24), and the legislative history, *see, e.g.*, 120 Cong. Rec. H12256-57 (daily ed. December 18, 1974), and concluded that the residual exception is to be strictly construed and that the failure of the proponent of the

evidence to provide pretrial notice cannot be cured by giving its opponent an adjournment, *see United States v. Ruffin*, 575 F.2d 346, 358-59 (2d Cir. 1978) (reversing conviction on count to which Rule 803(24) evidence was pertinent); *see also United States v. Oates*, 560 F.2d 45, 72-73 n.30 (2d Cir. 1977) (noting that legislative history of former Rules 804(b)(5) and 803(24), which contained identical notice provisions, "manifest[s] an intent that there be undeviating adherence to the requirement that notice be given in advance of trial").

The holding in *Ruffin*, which this Court has never overturned, was faithfully applied by the district court in the present case, and we thus see no error in the exclusion of the Strickland deposition.

4. *The New-Trial Motion*

Defendants also contend that after trial they discovered new evidence that a government witness, Thomas Calabro, had perjured himself at trial, and that the district court erred in denying their posttrial motion for a new trial, or at least in denying it without an evidentiary hearing. We are unpersuaded.

A motion for a new trial is ordinarily not favored and should be granted only with great caution. *See, e.g., United States v. Wong*, 78 F.3d 73, 79 (2d Cir. 1996); *United States v. Sasso*, 59 F.3d 341, 350 (2d Cir. 1995). Where the motion is based on an allegation of witness perjury, the threshold inquiry is whether the witness actually committed perjury, *see United States v. Torres*, 128 F.3d 38, 49 (2d Cir. 1997),

cert. denied, 118 S. Ct. 1399 (1998); *United States v. White*, 972 F.2d 16, 20 (2d Cir.), *cert. denied*, 506 U.S. 1026 (1992); if he did, the decision whether to grant a new trial on that basis "depends on the materiality of the perjury to the jury's verdict and the extent to which the prosecution was aware of the perjury," *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991). The defendant bears the "heavy burden" of showing that "the jury probably would have acquitted in the absence of the false testimony." *United States v. Moore*, 54 F.3d 92, 99 (2d Cir. 1995) (internal quotation marks omitted), *cert. denied*, 516 U.S. 1081 (1996). A new trial is not warranted where there is no reasonable likelihood that that perjury could have affected the jury's verdict, *see, e.g.*, *United States v. Torres*, 128 F.3d at 49, and is generally not warranted where the "core of the evidence" came from other witnesses, *United States v. Reyes*, 49 F.3d 63, 68 (2d Cir. 1995). The need for an evidentiary hearing as to whether perjury occurred and whether a new trial is warranted is diminished when "the judge observed the demeanor and weighed the credibility of the witness at trial." *United States v. DiPaolo*, 835 F.2d 46, 51 (2d Cir. 1987). "We will not reverse the denial of a new-trial motion or the refusal to conduct an evidentiary hearing" unless the decision constitutes an abuse of discretion. *United States v. Sasso*, 59 F.3d at 350.

Defendants in the present case have failed to meet their burden. The district court listened to the audio recording produced by defendants in support of their claim of perjury and found, *inter alia*, that the recorded statements of Calabro were "convoluted and contradictory" and that in light of the circumstances in which the tape was made, the statements

lent themselves to a number of interpretations, only one of which was that Calabro had testified falsely at trial. The judge, who had presided at defendants' trial and had an opportunity to observe all of the trial witnesses, also found that Calabro was a minor witness whose "facially innocuous" testimony was introduced only to provide partial corroboration for that of other, more important, witnesses. The court concluded that Calabro's testimony could not have affected the jury's verdict. We see no abuse of discretion in the court's refusal to conduct a more extensive evidentiary hearing, nor any error in its denial of the motion for a new trial.

5. *LaGrua's Sufficiency Challenge*

Finally, LaGrua challenges the sufficiency of the evidence to support his conviction on the substantive and conspiracy wire fraud counts. A defendant making a sufficiency challenge on appeal bears a heavy burden for "we view the evidence in the light most favorable to the government, drawing all inferences in the government's favor and deferring to the jury's assessments of the witnesses' credibility," *United States v. Allah*, 130 F.3d 33, 45 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 2347 (1998); *see also United States v. Amiel*, 95 F.3d 135, 141 (2d Cir. 1996), considering all the evidence in conjunction, *see, e.g., United States v. Miller*, 116 F.3d 641, 676 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 2063 (1998), and we will affirm if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original).

Appendix A

To establish wire fraud in violation of § 1343, the government is required to show, *inter alia*, a scheme to defraud for the purpose of obtaining money or property. *United States v. Trapilo*, 130 F.3d 547, 551-52 & n.7 (2d Cir. 1997), *cert. denied*, 119 S. Ct. 45 (1998). To come within this section, the scheme to defraud need not have been successful or complete, and it need not have resulted in actual injury to the scheme's victims. *See, e.g., United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994). However, proof of misrepresentations that amounted only to deceit is insufficient to establish a scheme to defraud; rather, the government must show that the defendant contemplated some actual harm to the fraud's victim. *See, e.g., id.*; *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987). The requisite intent may be inferred from the scheme itself where injury to others is one of the scheme's necessary consequences. *See, e.g., United States v. D'Amato*, 39 F.3d at 1257.

Although LaGrua contends that the government failed to prove that he intended to injure the Federal Home Loan Mortgage Corporation ("FHLMC"), the victim of defendants' scheme, he has not carried his burden. The government's proof at trial, viewed in the light most favorable to the government, included evidence that LaGrua and Ashley embarked on a scheme to fabricate loan applications for supposed owner-occupied properties; that loans on such properties are considered to be less risky than loans on other types of property; that LaGrua recruited family and friends to pose as the owners and occupiers of properties owned by LaGrua and Ashley or their affiliates; that defendants obtained appraisals on the properties but represented their values as substantially higher, in order to obtain larger loans

than would have been available on the basis of the appraised values; and that defendants then sold the loans to FHLMC on the basis that they were loans on owner-occupied properties and that the claimed valuations were based on proper appraisals. The necessary result of this scheme was to foist on FHLMC loans that were riskier than they were represented to be and that were secured by collateral that was inadequate by normal lending standards. The evidence was thus ample to permit a rational juror to infer beyond a reasonable doubt that defendants intended to and did sell FHLMC loans having significantly less value than they were represented to have, and hence was more than sufficient to support LaGrua's wire fraud convictions.

We have considered all of defendants' contentions on these appeals and have found them to be without merit. The judgments of conviction are affirmed.

FOR THE COURT:
KAREN GREVE MILTON,
Acting Clerk
by:

s/ Lucille Carr

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT IN *UNITED STATES OF AMERICA v. FRANK LAGRUA* DATED JUNE 8, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CASE NUMBER: CR 94-1235-02 (DRH)

UNITED STATES OF AMERICA

– v –

FRANK LaGRUA

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

PAUL A. BATISTA, ESQ.
950 THIRD AVENUE
NEW YORK, NY 10022
Defendant's Attorney & Address

AUSA — MICHAEL CORNACCHIA

THE DEFENDANT:

X was found guilty on counts 1,2,3,4,5,12,13,14,15,16,17 OF THE SUPERSEDING INDICTMENT (S-3) after a plea of not guilty.

Appendix B

Accordingly, the defendant is ADJUDGED guilty of such count(s), which involve the following offenses:

TITLE & SECTION	NATURE & OFFENSE	COUNT NUMBER(S)
18 USC 371	CONSPIRACY TO DEFRAUD	SSS1
18 USC 1343	WIRE FRAUD	SSS2-SSS5
18 USC 371	CONSPIRACY TO SUBORN PERJURY	SSS12
18 USC 1622	SUBORNATION OF PERJURY	SSS13 - SSS16
18 USC 1621	PERJURY	SSS17

The defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_X_ THE REMAINING UNDERLYING COUNTS ARE DISMISSED ON MOTION OF THE UNITED STATES.

_X_ It is ordered that the defendant shall pay to the United States a special assessment of $ 550.00 ON OR BEFORE SEPTEMBER 25, 1998.

It is further ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

* * *

JUNE 5, 1998
Date of Imposition of Sentence

* * *

s/ Denis R. Hurley
DENIS R. HURLEY,
UNITED STATES DISTRICT JUDGE

DATED: JUNE 8, 1998

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT IN *UNITED STATES OF AMERICA v. KENNETH ASHLEY* DATED SEPTEMBER 24, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CASE NUMBER: CR 94-1235-01 (DRH)

UNITED STATES OF AMERICA

– v –

KENNETH ASHLEY

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

RONALD G. RUSSO, ESQ.
HERZFELD & RUBIN
40 WALL STREET
NEW YORK, NY 10005-2349
Defendant's Attorney & Address

AUSA — MICHAEL CORNACCHIA

THE DEFENDANT:

_X_ was found guilty on count(s) 1,2,3,4,5,12,13,14,15, and 16 OF THE THIRD SUPERSEDING INDICTMENT after a plea of not guilty.

Appendix C

Accordingly, the defendant is ADJUDGED guilty of such count(s), which involve the following offenses:

TITLE & SECTION	NATURE & OFFENSE	COUNT NUMBER(S)
18 USC 371	CONSPIRACY TO COMMIT WIRE FRAUD	SSS1
18 USC 1343	WIRE FRAUD	SSS2 - SSS5
18 USC 371	CONSPIRACY TO SUBORN PERJURY	SSS12
18 USC 1622	SUBORNATION OF PERJURY	SSS13 - SSS16

The defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_X_ THE REMAINING COUNTS SSS6 - SSS11 AND THE UNDERLYING INDICTMENTS ARE DISMISSED ON MOTION OF THE UNITED STATES.

_X_ It is ordered that the defendant shall pay to the United States a special assessment of $500.00 TO BE PAID ON OR BEFORE OCTOBER 16, 1998.

It is further ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of

any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

* * *

SEPTEMBER 24, 1998
Date of Imposition of Sentence

* * *

s/ Denis R. Hurley
DENIS R. HURLEY,
UNITED STATES DISTRICT JUDGE

DATED: SEPTEMBER 24, 1998

APPENDIX D — EXCERPTS FROM CHARGE OF THE TRIAL COURT

[commencing at page 3104]

* * *

Aiding and abetting.

The defendants are charged with aiding and abetting one another and others in the commission of the substantive wire fraud offenses presently under discussion as set forth in Counts Two, Three, Four and Five of the indictment.

The statute which defines aiding and abetting reads as follows:

Title 18, United States Code, Section 2(A):

> "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Now at this point, ladies and gentlemen, what I'm [3105] going to do while this portion of the charge is still fresh in your mind, I'm going to read for you the introductory counts to the — the introductory language to the counts as set forth in the indictment, and then I'll actually read each count, that would be Two, Three, Four and Five.

I will reiterate again this is merely to underscore for you the nature of the accusation. It is an accusation, what's in the indictment is not evidence.

* * *

Appendix D

[3152] * * *

Aiding and abetting.

You'll recall I provided you with this instruction [3153] concerning Counts Two, Three, Four and Five, those being the substantive wire fraud counts. The definition is also applicable as to the counts which charge subordination of perjury. I will provide it to you again.

The defendants are charged with aiding and abetting one another and others in substantive subordination of perjury offenses contained in Counts Seven, Eight, Nine and Ten.

The statute which defines aiding and abetting reads as follows:

Title 18, United States Code, Section 2(A):

"Whoever commits and offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

With respect to Counts Seven through Ten, you must again consider each count, and each defendant separately. As to each count and each defendant, if the government has proven all of the elements of the crime charged, you should return a guilty verdict as to the defendant you are considering.

If, on the other hand, the government fails to prove one or more of the elements, beyond a reasonable doubt, you must acquit the defendant as to that count.

* * *

Appendix D

[3159] * * *

Ladies and gentlemen, before we continue with the discussion of Counts One and Six, and more particularly my charge to you concerning those two counts, they are the two counts that charge conspiracy, I want to go back and supplement a portion of the charge which I've already provided to you.

With respect to Counts Two, Three, Four and Five, those being the so-called wire fraud counts, you'll remember I charged you on the law of aiding and abetting. I also charged you on the law of aiding and abetting with respect to Counts Seven, Eight, Nine and Ten, those being the counts that pertain to the charge of subornation of perjury.

Now — and the pages of the charge that would be implicated or involved would be page 42, that being the definition of aiding and abetting appears with respect to [3160] the wire fraud counts, and then also page 54, that being the portion that pertains to the subornation of perjury. I'm going to supplement that charge as follows:

A person who aids, abets, counsels or commands or induces or procures the commission of such an offense must do so with the specific intention that the offense charged which you are considering be committed.

In other words, this goes to the operation of the person's state of mind in essence. The idea of aiding and abetting is that if one person induces, causes, procures another to commit an offense against the United States, a person who

basically acts through another is treated the same as if he or she committed the acts themselves.

But the point is, there's more required concerning aiding and abetting. What more is required is when the person procures another to commit a crime against the United States, if that's what in fact occurred, that person, the person that prompted the action, must have a specific intention than the person is doing so, that the crime occur, that something charged in the accusatory instrument occurs.

This is a supplement. It pertains to the counts that I've mentioned, the substantive count of wire fraud and subornation of perjury and it reads as follows:

The person who aids, abets, counsels, commands or [3161] induces or procures the commission of such an offense must do so with the specific intention that the offense charged in Counts Two, Three, Four and Five, as the case may be, and Counts Seven, Eight, Nine and Ten, as the case may be, be committed.

* * * *